Supreme Court, U.S.
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CASE NO. 97-____
IN THE UNITED STATES SUPREME COURT
October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

RICARDO GONZALEZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

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30 pp

QUESTION PRESENTED

[Capital Case]

Whether the Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted," and that such statements can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless they do not mention the defendant at all?

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CASE NO. 97-____
IN THE UNITED STATES SUPREME COURT
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THE STATE OF FLORIDA,
Petitioner,

vs.

RICARDO GONZALEZ,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, case number 84,841, as well as the court's order denying rehearing. The parties will be referred to as they appear before this Court or as they stood in the trial court: "Petitioner" or "the State" and "Respondent" or "Defendant."

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3). The judgment under review was entered on September 18, 1997. Rehearing was denied on October 30, 1997. This petition was therefore due to be filed on January 27, 1998. Petitioner would, however, respectfully request the Court to overlook the untimely filing of this petition for the following reasons. Petitioner inadvertently calendared the petition as being due on February 20, 1998. Upon discovering its error, Petitioner served and filed the petition as quickly

as possible. As noted, infra, the decision under review was based upon the Florida Supreme Court's decision in Franqui v. State, 699 So. 2d 1312 (Fla. 1997). That decision, as well as several other cases in which Franqui was followed are already before the court, the petitions all having been served on January 16, 1998. See Florida v. Franqui (I), No. 97-1202; Florida v. Franqui (II), No. 97-1203; Florida v. Douglas Escobar, No. 97-1204; Florida v. Dennis Escobar, No. 97-1205.[1] The issues herein are identical to those presented in the cited cases. Moreover, the Respondent will not be prejudiced by the late filing of this petition, in that the period of time between the actual due date and the date of filing was relatively brief, and because the Florida Supreme Court, while it reversed Respondent's sentence of death, did not disturb Respondent's first-degree murder conviction, which at the time of Respondent's crime carried a sentence of death or life with a 25-year minimum mandatory term. For the foregoing reasons, Petitioner respectfully requests that the Court overlook its negligence and accept this petition as timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Defendant and his codefendants Leonardo Franqui and Pablo San Martin were convicted of the first degree murder of a law enforcement officer, armed robbery, aggravated assault, and two counts of grand theft, and sentenced to death. Gonzalez v. State, 700

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[1] Note that paragraph two of the motions for extension of time in which to file the petition, filed in these four cases on December 17, 1997, Petitioner specifically noted its belief that the instant petition would be due on February 20, 1998, and that therefore no extension as to the Gonzalez petition would be required.

So. 2d 1217 (Fla. 1997). The Florida Supreme Court recited the following facts in the opinion under review:

> The defendant, Ricardo Gonzalez, along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft in the third degree, and burglary.[1] Gonzalez, Franqui, and San Martin were tried together before a jury in May, 1994.
>
> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.
>
> Approximately two weeks later, Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. He was subsequently reinterviewed by police and, among other things,

described how Franqui had shouted at the victim not to move before shooting him.[2]

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Gonzalez, the confessions of codefendants San Martin and Franqui were introduced without deletion of their references to Gonzalez, upon the trial court's finding that their confessions "interlocked" with Gonzalez's own confession.

Gonzalez was convicted on all counts, and after a penalty phase trial, the jury recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Gonzalez to death.

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[1] One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol-prossed by the State after its opening statement.

[2] San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery, but could not say who carried guns or did the shooting.

700 So. 2d at 1217-18 (footnotes the court's).

Defendant challenged the admissibility of the statements of codefendants Franqui and San Martin in the trial court. The State argued that they were properly admissible under Cruz v. New York, 481 U.S. 186 (1987), Lee v. Illinois, 476 U.S. 530 (1986), and Grossman v. State, 525 So. 2d 833 (Fla. 1988), and the trial court admitted them. (R. 221). Defendant raised the issue on appeal, asserting that the admission violated Bruton v. United States, 391 U.S. 123 (1968); the State responded that the admission was proper, and if not, harmless. In reliance on its opinion in Franqui v. State, 699 So. 2d 1312 (Fla. 1997)("Franqui I"),[2] the Florida Supreme Court ruled that the trial court erred in admitting Gonzalez's statement. Gonzalez v. State, 700 So. 2d at 1219. In Franqui I, the Florida Supreme Court had overruled Grossman, and further held that a codefendant's declaration against penal interest is not a firmly rooted exception to the hearsay rule, 699 So. 2d at 1318-19, and that its admission thus will violate the Confrontation Clause unless the circumstances surrounding

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[2] Codefendant Franqui has two capital murder convictions. The first, for the December 6, 1991, murder of Raul Lopez, was imposed after Franqui's joint trial with Pablo San Martin and will be referred to herein, as it was in the four related petitions the State filed in this court on January 16, 1998, as Franqui I. Franqui's second case, Franqui v. State, 699 So. 2d 1332 (Fla. 1997)("Franqui II"), involved the same crime of which Defendant was convicted, and which is the subject matter of the instant petition -- the January 3, 1992, murder of police officer Steven Bauer.

the statement demonstrate particularized guarantees of trustworthiness, id., and further, that the only such circumstance to be considered is whether the codefendant's statement was "individually self-incriminating," which the court construed to mean devoid of any mention of the defendant or the defendant's actions. 699 So. 2d at 1320. In this case, the Florida Supreme Court found the error to be harmless as to Defendant's conviction, but reversed Defendant's sentence because it believed that Franqui's confession portrayed Defendant "as the aggressor who had precipitated the shooting." Gonzalez, 700 So. 2d at 1219.

Although the error was held harmless in Franqui I, 699 So. 2d at 1322, 1329, the State has sought review of that case because, in reliance on it, the Florida Supreme Court has reversed not only the sentence in this case, but Franqui's death sentence in Franqui II, 699 So. 2d at 1336, and the convictions and sentences of death in Dennis Escobar v. State, 699 So. 2d 984, 986 (Fla. 1997), and Douglas Escobar v. State, 699 So. 2d 988, 992 (Fla. 1997).[3] In San Martin v. State, 1997 WL 792796 (Fla. Dec. 24, 1997), the companion case to Franqui I, the court held that Bruton error occurred, but was harmless. San Martin v. State, No. 84,702, in which San Martin has also raised the Bruton issue in challenging his conviction and sentence for the Bauer murder, remains pending in the Florida Supreme Court.[4]

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[3] Apart from the Florida Supreme Court having based its reversal on Franqui I, the Escobar brothers' cases are wholly unrelated to that of Defendant or his accomplices.

[4] Another codefendant, who was involved in both murders, Pablo Abreu, pled guilty prior to trial and received life sentences. The final codefendant in the Bauer case, Fernando Fernandez, was tried before a separate jury. No Bruton issue was raised in his capital appeal, which is pending in the Florida Supreme Court as Fernandez v. State, No. 84,700.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS AGAINST PENAL INTEREST IS "FIRMLY ROOTED," AND AS TO WHETHER SUCH STATEMENTS, WHEN MADE BY A NONTESTIFYING CODEFENDANT, CAN EVER EXHIBIT SUFFICIENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS TO BE ADMITTED AGAINST THE DEFENDANT.

A. The Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted."

In Ohio v. Roberts, 448 U.S. 56, 64-66 (1980), and again in Idaho v. Wright, 497 U.S. 805, 814-15 (1990), this Court set forth a two-prong test enunciating the circumstances under which the statement of a nontestifying witness may be admitted against a defendant in a criminal trial. Under the first prong of the test, such a statement may be admitted without running afoul of the Confrontation Clause if it falls within a "firmly rooted" hearsay exception.[5] The question presented is whether the hearsay exception for statements against penal interest is firmly rooted so as to allow such statements to be directly admitted against the declarant's accomplice without violating the Confrontation Clause. This issue has not been addressed by the Court, see Williamson v. United States, 512 U.S. 594, 605 (1994)(O'Connor, J.)("in particular we need not decide whether the hearsay exception for declarations against penal interest is "firmly rooted" for Confrontation Clause purposes"), and is a matter of

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[5] The second prong, relating to statements not falling within a firmly-rooted exception, is addressed at Subpoint B, infra.

dispute among the state and federal courts that have addressed it, causing aberrant results in an area where uniformity in the application of a legal principle is desirable, if not mandated.

Below, the Florida Supreme Court relied on its previous holding in Franqui I, and concluded that error occurred.[6] In that case, the court recognized the Roberts rule, Franqui I, 699 So. 2d at 1319, but concluded that statements against penal interest are not firmly rooted. The court reasoned that because such statements were specifically excluded by the Florida evidence code from 1977 until 1990, the exception could not be considered firmly-rooted.[7] Id. Both

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[6] The court's entire analysis as to error follows:

> In [Franqui I], we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is no question that both Franqui's confession and San Martin's confession interlocked with Gonzalez's confession in many respects and was substantially incriminating to Gonzalez. Moreover, we cannot say that the totality of the circumstances under which Franqui and San Martin made their confessions demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.
>
> Thus, the admission of the confessions of Franqui and San Martin was error.

Gonzalez, 700 So. 2d at 1219.

[7] Even this conclusion is suspect, however. Before the adoption of the evidence code, the court had recognized declarations against penal interest as an exception in Baker v. State, 336 So. 2d 364 (Fla. 1976). The exception was included when the new evidence code, which was modeled on the federal rules, was statutorily adopted. §90.804(2)(c), Fla. Stat. (1977). The court below was apparently referring to additional language in the Florida version of the rule that prohibited the use of such statements against criminal codefendants jointly tried. Id. Several courts, however, had concluded that the limiting language was merely intended to codify Bruton, and, as such, had held that it did not prohibit the admission of any statements admissible under Bruton

the Florida Supreme Court's reasoning in Franqui I and its conclusion below are flawed.

The Florida Supreme Court has illogically concluded, based solely on the recent history of Florida's evidentiary provisions, rather than federal interpretation of the Confrontation Clause, that for the purposes of the federal Confrontation Clause, the exception for declarations against penal interest is not firmly-rooted. This question can only be determined by looking at the evidentiary practices of the nation as a whole, especially federal interpretations. Were the court's reasoning followed, a different meaning of the term "firmly-rooted" would ensue for every individual state, depending upon the dictates and history of that state's rules of evidence. The state court's analysis stands in stark contrast with this Court's approach in White v. Illinois, 502 U.S. 346, 355 n.8 (1992), where the Court, holding that the hearsay exceptions for spontaneous declarations and statements made for medical treatment were firmly rooted, looked to the historical evolution of those exceptions in 17th century English common law, and further observed that the evidence codes of almost four-fifths of the states currently recognized the exception, as did the Federal Rules of Evidence. Similarly, in Bourjaily v. United States, 483 U.S. 171, 182-84 (1990), the Court, in recognizing as firmly rooted the co-conspirator exception, looked, not to any single state's treatment of that exception, but to early federal case law. Thus, the Florida Supreme Court's narrow focus on Florida's treatment of declarations against penal interest was inappropriate in determining whether that exception is firmly rooted under the Confrontation Clause of the United States Constitution.

Had the court looked beyond the borders of Florida, it would have found that the overwhelming majority of federal appellate courts

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and its progeny. See Charles W. Ehrhardt, Florida Evidence §804.4 (1996); Maugeri v. State, 460 So. 2d 975, 980 (Fla. 3d DCA 1984); Cipollina v. State, 501 So. 2d 2, 3 (Fla. 2d DCA 1986), rev. denied, 509 So. 2d 1119 (Fla. 1987). The limiting language was repealed in 1990. §90.804(2)(c), Fla. Stat. (1991).

have determined that the exception is firmly rooted. See United States v. Trenkler, 61 F. 3d 45, 62 (1st Cir. 1995)(declaration against penal interest is firmly rooted exception); United States v. Katsougrakis, 715 F. 2d 769, 775 (2d Cir. 1983); Neumann v. Rivers, 125 F.3d 315, 319 (6th Cir. 1997); United States v. York, 933 F. 2d 1343, 1363 (7th Cir. 1991)("Our holding in Garcia was tantamount to saying that the exception is well-rooted within the meaning of Roberts and Bourjaily, and we affirm that view today"); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987);[8] Jennings v. Maynard, 946 F. 2d 1502, 1505 (10th Cir. 1991)[9]; United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991). The only federal appellate court to expressly come to a contrary conclusion is the Fifth Circuit, in United States v. Flores, 985 F. 2d 770 (5th Cir. 1993).

At least eight states have concluded that the exception is firmly rooted. State v. Jankiewicz, 831 S.W.2d 195, 198 (Mo. 1992); State v. Sego, 629 A.2d 1362, 1367 (N.J. Super. App. Div. 1993); State v. Tucker, 820 P. 2d 834, 838 (Or. App. 1991), rev. denied, 855 P.2d 150 (Or. 1993); Aylor v. State, 1997 WL 136479 (Tex. App. Mar. 26, 1997)(unpublished opinion); State v. Drawn, 791 P.2d 890, 894 (Utah 1990); Randolph v. Com., 482 S.E.2d 101, 105 (Va. 1997); State v. Denny, 471 N.W.2d 606, 609 (Wis. App. 1991); State v. Dorcey, 298 N.W.2d 213, 216 (Wis. App. 1980), aff'd, 307 N.W.2d 612 (Wis. 1981).[10] A number of state appellate courts have,

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[8] The Eighth Circuit appears to draw a distinction between custodial and non-custodial statements against penal interest, concluding that while the latter fall within a "firmly rooted"exception, the former do not. See, e.g., Olson v. Green, 668 F.2d 421, 428 (8th Cir. 1982). The State submits this is not a valid distinction; see the discussion of Lee v. Illinois, infra.

[9] Jennings was reconstrued by the 10th Circuit in Earnest v. Dorsey, 87 F. 3d 1123, at n. 6 (10th Cir. 1996), where the Court stated that it was not addressing "whether, in general, the exception for statements against penal interest is firmly rooted."

[10] Dorcey was followed in State v. Thornton, 322 N.W.2d 699 (Wis. App. 1982), 1982 WL 172430, ***3 (unpublished opinion), but ignored in State v. Myren, 395 N.W.2d 818, 821 (Wis. App. 1986), in which the court concluded that Lee prevented it from considering the issue. In Denny, Myren

on the other hand, found the exception not to be firmly rooted. Linton v. State, 880 P.2d 123, 129 (Alaska App. 1994); State v. Daniel, 817 P.2d 18, 20 (Ariz. 1991); People v. Fincham, 799 P.2d 419, 422 (Colo. App. 1990); State v. Kimble, 688 So. 2d 552, 565 (La. App. 1996)(on rehearing); Chapman v. State, 628 A.2d 676 n.3 (Md. 1993); People v. Spinks, 522 N.W.2d 875, 878 (Mich. App. 1994); State v. Watts, 452 N.W.2d 728, 732 (Minn. App. 1990); State v. Hughes, 510 N.W.2d 33, 38 (Neb. 1993); State v. Abourezk, 359 N.W.2d 137, 141 (S.D. 1984)(on rehearing); State v. Whelchel, 801 P.2d 517, 952 (Wash. 1990); State v. Mason, 460 S.E.2d 36, 46 (W. Va. 1995).[11]

Some of the latter courts have relied on Lee v. Illinois, 476 U.S. 530 (1986), in concluding that the hearsay exception for statements against penal interest is not firmly-rooted.[12] These courts have misread Lee because that case did not squarely confront the issue, but merely "reject[ed] respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" 476 U.S. at 544 n.5. The Lee footnote should not be broadly read as concluding that a statement against penal interest is not firmly rooted, or that a statement falling under the exception cannot satisfy the Confrontation Clause. The Court's subsequent discussion of the statements in Lee makes it questionable whether the portions of the statements inculpating the defendant in Lee would have qualified as statements against penal interest. See Williamson, discussed infra.

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was not mentioned, and the court held that the exception was firmly rooted.

[11] New Hampshire appears to have concluded that the exception is not firmly rooted. See State v. Cook, 610 A.2d 800, 808 (N.H. 1992)(Thayer, J., specially concurring and objecting to the majority's failure to treat exception as firmly rooted).

[12] Lee has also caused at least one federal court to question its previous conclusion that the exception is firmly rooted. See Latine v. Mann, 25 F.3d 1162, 1166 (2d Cir. 1994)(questioning whether the court's previous conclusion in Katsougrakis, that the statement against penal interest exception was firmly rooted, survived Lee, but declining to address the issue).

The better reading of note 5,[13] particularly in light of Williamson's subsequent limitations on which statements qualify as being against penal interest, is simply that the statements in question would not have qualified, obviating any studied consideration of the issue. See York, 933 F.2d at 1363 n.4 (so holding); Randolph, 482 S.E.2d at 105 n.3 (same); State v. Nielsen, 853 P.2d 256, 270 n.16 (Or. 1991)(same); also Drawn, 791 P.2d at 894 (citing Lee as a limitation on statements qualifying as against penal interest).[14]

Accepting that statements against penal interest qualify as firmly rooted, the question remains whether the statement at issue here qualifies. In Williamson, the Court thoroughly discussed the limits of the hearsay exception for statements against penal interest set forth in Fed. R. Evid. 804(b)(3).[15] In that case, the Court concluded that only the portions of the declarant's statement that are "truly self-inculpatory" fall within the exception. 512 U.S. at 600. The Court further noted that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." 512 U.S. at 603. Any portion of a statement inculpating the codefendant must be viewed in

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[13] The language of note 5 does not make clear the precise argument that the state had advanced, i.e., whether it was even posited that the penal interest exception was firmly rooted.

[14] See also Cruz v. New York, 481 U.S. 186, 194 (1987), where the Court stated that no Bruton violation occurs where the codefendant's statement is "directly admissible against" the defendant. Presumably the determination of "direct admissibility" is made according to the Roberts formulation. Of note, both Lee and Cruz were squarely predicated on Bruton, wherein it was also explicitly pointed out that the Court was "intimat[ing] no view whatever" as to whether a statement admissible "under traditional rules of evidence" would run afoul of the Confrontation Clause. Bruton, 391 U.S. at 128 n.3. It should also be noted that Bruton involved a federal prosecution governed by the Federal Rules of Evidence, which at the time of the trial therein did not provide for a hearsay exception for declarations against penal interest.

[15] Florida's rule is identical to the federal rule. See §90.804(2)(c), Fla. Stat.

context, bearing in mind that even statements that on their face do not suggest guilt may be self-inculpatory where they expose the declarant to criminal liability. Id.

Under these standards, the statement of Defendant's codefendant, Leonardo Franqui, comes squarely within the exception. Although Franqui indicated that he participated in and committed the robbery that led to the murder of Officer Bauer with Defendant and the other three accomplices, at no point did he attempt to minimize his own guilt. Rather, to the extent his accomplices were mentioned, it was in the context of a joint enterprise. And indeed, when relating the crucial events surrounding the shooting, Franqui's statement in no significant way minimized his own conduct or tried to curry favor by giving evidence against Defendant

The Florida Supreme Court, in the context of its penalty-phase harmless error analysis, described Franqui's statement as portraying Defendant as the aggressor. Gonzalez, 700 So. 2d at 1219. Even were this an accurate reading of Franqui's statement, it would in no way detract from the wholly self-inculpatory nature of Franqui's description of his own activities. In his confession, Franqui stated that he agreed to participate in the planned robbery of the bank, and then on the appointed day, armed himself, exited his vehicle with the gun drawn, approached two tellers and the armed police officer as they walked across the bank lot, and then shot the officer when the officer drew his own gun, after which he accepted his share of the proceeds ($2400). (T. 1669-82). In short, he confessed to being a full participant, as one of the two shooters out of five accomplices, to a capital crime. As such, the only dispute between Franqui's statement and that of Defendant, as to which of the two fired first, is of little moment. Whether Defendant fired and then Franqui a second later, (per Franqui's statement) or vice versa (per Defendant's), the critical fact is that Franqui stated that he, Franqui, did shoot the police officer in the course of the robbery. Under Williamson, there can be little

doubt that Franqui's statement was truly self-inculpatory and thus properly admissible as a statement against penal interest.[16]

Assuming the statements in question do qualify as statements against penal interest, and assuming that the exception qualifies as firmly rooted, there is no basis to depart from Roberts' analytical framework, as recently reaffirmed in Wright. Any implication in footnote 5 of Lee that a statement against penal interest is somehow less trustworthy than any other firmly-rooted hearsay exception is unwarranted. "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Wright, 497 U.S. at 817.

Because the Florida Supreme Court applied an incorrect standard in Franqui I in determining whether the statement against penal interest exception to the hearsay rule is "firmly rooted," which analysis it in turn applied below, and because this Constitutional issue is one of conflict among the lower courts, the Court should accept jurisdiction to resolve the question.

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[16] The Florida Supreme Court had previously read Cruz to allow codefendant confessions to be admissible if their "interlocking" nature showed them to be reliable. See Grossman v. State, 525 So. 2d 833, 838 (Fla. 1988). Relying on Grossman, the trial court had thus deemed Franqui's statement admissible because it and Defendant's statements were "as concern[ed] all material details, indistinguishable" and therefore "contain[ed] the indicia of reliability necessary to allow their introduction during a joint trial as direct evidence." (R. 221). In Franqui I, the court concluded that Grossman was no longer viable in the wake of Wright's holding that the indicia of reliability must be intrinsic to the statement or the declarant. Franqui I, 699 So. 2d at 1319. Because the trial court relied on Grossman, the trial court made no determination as to whether the statement was truly self-inculpatory. There is no reason, however, why this question, which merely requires a reading of the statement, could not be performed on appeal. Indeed the Florida Supreme Court did just that with regard to the codefendant's second statement in Franqui I. 699 So. 2d at 1320.

B. The Florida Supreme Court erred in determining that a codefendant's statement can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless it does not mention the defendant at all, regardless of whether the statement was wholly self-inculpatory, thoroughly interlocked with the defendant's confession, and was made after a knowing and intelligent waiver of constitutional rights.

Under Roberts, 448 U.S. at 64-66, and Wright, 497 U.S. at 814-15, if a statement does not fall within a firmly-rooted exception to the hearsay rule, it is inadmissible in the absence of evidence demonstrating particularized guarantees of trustworthiness. In Lee, 476 U.S. at 543, and Cruz, 481 U.S. at 194, the Court noted that even the statement of a codefendant may be admissible directly against a defendant if it satisfies this standard. Further, in Williamson, 512 U.S. at 605, Justice O'Connor stated that "the very fact that a statement is truly self-inculpatory ... is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."

Even assuming that the exception for statements against penal interest is not firmly rooted, the Florida Supreme Court has misconstrued the Confrontation Clause. The Florida Supreme Court, citing Justice O'Connor's statement in Williamson quoted above, concluded that a codefendant's statement against penal interest demonstrates sufficient particularized guarantees of trustworthiness to be admissible.[17] The court's error lies in its conclusion that to be

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[17] A number of courts, including those that have either rejected the notion that the penal interest exception is firmly rooted, or declined to decide the issue, have held that the statement's truly self-inculpatory nature constitutes a sufficient particularized guarantee of trustworthiness so as to allow the statement to be admitted. See, e.g., United States v. Barone, 114 F.3d 1284, 1301 (1st Cir. 1997); State v. Wilson, 918 P.2d 826, 837 (Or. 1996) State v. Mullaly, 1997 WL 651649, *4 (Wash. App. Oct. 9, 1997)(unpublished opinion); People v. Greenberger, 68 Cal. Rptr. 2d 61, 79 (App. 1997); People v. Thomas, 687 N.E.2d 892, 903 (Ill. 1997); State v. Nielsen, 853 P.2d 256, 268 (Or. 1991). Others have suggested that the custodial statements of

"genuinely self-inculpatory" a statement must be "individually self-inculpatory," i.e., it must contain no reference whatsoever to the defendant. Franqui I, 699 So. 2d at 1320; see also San Martin, 1997 WL at *4, *13 (the admission of Franqui's confession was held to be error because it "implicate[d] San Martin in the planning and execution of this crime," despite the fact that "[i]n both confessions, San Martin was portrayed as an equal participant in this enterprise"). Williamson, however, makes it clear that such a formalistic approach is inappropriate. The question is not whether the declarant mentions or inculpates any others in the course of his statement, but rather whether he fully inculpates himself. Although Williamson only addressed an evidentiary issue under the Federal Rules of Evidence, its misreading by the Florida Supreme Court still presents a basis for granting the writ because its overly-narrow reading of the case led to its conclusion that all statements by accomplices that mention the defendant violate the Sixth Amendment.

A "truly self inculpatory" statement is one of the particularized guarantees of trustworthiness, in part, also because it is not an attempt to shift blame or curry favor. Williamson, 512 U.S. at 605. As noted in Subpoint A, although Gonzalez mentioned Defendant in his statement in the context of a joint enterprise, he also thoroughly inculpated himself and did not attempt to shift blame or curry favor. The self-inculpatory nature of the statement was thus itself a particularized guarantee of trustworthiness that should have been, but was not, considered by the court below in determining admissibility under the Confrontation Clause.

A custodial statement such as Franqui's, however, bears other guarantees of trustworthiness. For example, before such statements may be admitted at trial, the State has the burden of establishing that such statements were made voluntarily -- i.e., that the confession was the product of free will, without coercion, duress or deception at the

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codefendants may never be admitted. See, e.g., Olson, noted above.

time of its making. Jackson v. Denno, 378 U.S. 368 (1964).[18] The State also bears the burden of establishing that such statements were made only after procedural safeguards were honored -- i.e., that Miranda[19] warnings were given -- and must show that the declarant waived the Miranda rights knowingly, intelligently and voluntarily. Miranda, 384 U.S. at 479. Here, the trial court did in fact make pretrial determinations that both of these requirements had been met. These factors too, which bear directly on the circumstances surrounding the making of the statement, must also be considered in the trustworthiness determination. Wright, 497 U.S. at 820 ("We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief").

Finally, the statements of Defendant and Franqui were interlocking in every material respect. Gonzalez, 700 So. 2d at 1219; see also R. 221, quoted at n.15, supra. This, too, was a factor that the court below should have considered as a particularized guarantee of trustworthiness, but did not. Cruz, 481 U.S. at 192 ("Quite obviously, what the 'interlocking' nature of the co-defendant's confession pertains to is not its harmfulness but rather its reliability")(emphasis supplied). Thus, in Cruz, it was noted that "[o]f course, the defendant's confession may be considered at trial in assessing whether his co-defendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him." 481 U.S. at 193-94 (citing Lee, 476 U.S. at 543-44). The court below recognized these statements in Cruz, but held that this Court had modified Cruz in Wright and that the interlocking nature of statements could thus not be considered. Franqui I, 699 So. 2d at 1318-19. The truly interlocking nature of the statement is a circumstance which at least renders "the declarant particularly worthy of belief," as required

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[18] See also Land v. State, 293 So. 2d 704 (Fla. 1974), Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989), and Fla. R. Crim. P. 3.190, which have incorporated the requirements of Denno.

[19] Miranda v. Arizona, 384 U.S. 436 (1966).

in Wright, 497 U.S. at 820, especially when considered in conjunction with the truly self-inculpatory content of the statement, the voluntariness of the statement, and the knowing waiver of constitutional rights.

In Wright, 497 U.S. 823 n.*, this Court observed that in Cruz, it had "said nothing about whether the co-defendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession." (Emphasis supplied). However, this is not a case of relying only on the fact that Defendant's and Franqui's statements interlock. Rather, the interlocking content is one factor, in conjunction with the other factors noted above, that may be considered in determining whether the statement bears sufficient indicia of reliability to overcome any presumption of unreliability.

Because the Florida Supreme Court has read Williamson to require the exclusion, on Sixth Amendment grounds, of all codefendant statements that mention the defendant, regardless of whether the statement is otherwise reliable, and because this issue is one of conflict among the courts, the Court should accept jurisdiction.[20]

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[20] Petitioner also submits that the Florida Supreme Court's harmless error analysis was contrary to the express dictates of Cruz and Wright. In Franqui I, the court recognized that "it is equally clear that the interlocking nature of the confession is likely to render the Confrontation Clause violation harmless on appellate review." Franqui I, 699 So. 2d at 1321. The court thus concluded that "while that portion of [the codefendant's] confession which implicated Franqui should not have been introduced into evidence, the fact that it mirrors Franqui's confession in so may respects strongly indicates that the error was harmless." Id. In the opinion below, the court recognized that Confrontation Clause violations are subject to harmless error review on appeal. Gonzalez, 700 So. 2d at 1219. In concluding that the alleged error was harmful as to Defendant's sentence, however, the court overlooked not only the interlocking nature of the confessions, but also the nature of the factors in aggravation and mitigation, as well as the evidence presented at trial. In reversing Defendant's sentence, the Florida Supreme Court cited its belief that Franqui's statement portrayed Defendant as the

"aggressor." Id. That conclusion is unwarranted where the undisputed evidence showed that the plan was to rob the tellers, who were protected by an armed guard, with guns. The evidence showed that both Franqui and Defendant were willing, equal, participants in that plan. Moreover, Defendant's own statements support the conclusion that at the very least, Defendant and Franqui were joint aggressors. In a second interview, Defendant clarified the details of the shooting, explaining that he and Franqui had the officer pinned between them, so that "there was nowhere for the officer to go" and then they shot him. (T. 1551-54). Moreover, even if Gonzalez could be seen as the aggressor, the evidence in respect to the entire sentencing calculus, including testimony about the murder in Franqui I, where Franqui fired the fatal shot, as well as three other highly-planned armed robberies that Franqui had committed, clearly established Franqui, not Defendant, as the more culpable and blood-thirsty participant, a point the jury apparently took into account, recommending death for Franqui by a vote of 9-3, compared with Defendant's 7-5 death vote. Nevertheless, given that this was a crime of greed committed during a felony, and that the victim was a young police officer killed in the line of duty, when weighed against the insignificant mitigation that Defendant presented (Defendant did not, on appeal below, challenge the trial court's finding that the mitigation was insignificant), there can be no other reasonable conclusion than that any error relating to the brief inconsistencies between the statements was harmless beyond a reasonable doubt. Thus, pursuant to Cruz, Wright, and even the lower court's own decision in Franqui I, the admission of the codefendant's confession should have been found harmless as to Defendant's sentence.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070

Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

APPENDIX

Supreme Court of Florida

RICARDO GONZALEZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. 84,841

[September 18, 1997]

PER CURIAM.

This is an appeal from a judgment of guilt and sentence of death upon Ricardo Gonzalez. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

FACTS

The defendant, Ricardo Gonzalez, along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft in the third degree, and burglary.[1] Gonzalez, Franqui, and San Martin were tried together before a jury in May, 1994.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly

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[1] One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol-prossed by the State after its opening statement.

after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him.[2]

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Gonzalez, the confessions of codefendants San Martin and Franqui were introduced without deletion

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[2] San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery, but could not say who carried guns or did the shooting.

of their references to Gonzalez, upon the trial court's finding that their confessions "interlocked" with Gonzalez's own confession.

Gonzalez was convicted on all counts, and after a penalty phase trial, the jury recommended death by a vote of seven to five. The trial court followed the jury's recommendation and sentenced Gonzalez to death. Gonzalez raises the following issues on appeal: (1) that the trial court erred in denying Gonzalez's peremptory challenges of jurors Diaz and Andani; (2) that the trial court erred in denying Gonzalez's motion for severance based upon the introduction of the confessions of nontestifying codefendants Franqui and San Martin at their joint trial; (3) Gonzalez was denied an impartial hearing at his penalty phase because of the court's refusal to sever his case and to permit him to cross-examine San Martin's experts; and (4) his death sentence is disproportionate.

JURY SELECTION

Speaking for all three defendants, defense counsel sought to exercise a peremptory challenge to excuse prospective jurors Diaz and Andani from the jury. The State objected to the challenges. The court conducted an inquiry pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984), and ultimately struck these challenges. We conclude that the court's determination to strike the challenges of prospective jurors Diaz and Andani was not clearly erroneous. The rationale for approving the striking of the challenge of Diaz is set forth in our opinion relating to the appeal of Franqui arising out of the same case. Franqui v. State, 22 Fla. L. Weekly S391 (Fla. July 3, 1997).

ADMISSION OF CODEFENDANTS' STATEMENTS AGAINST GONZALEZ

Gonzalez also asserts that the trial court erred by permitting the confessions of his codefendants Franqui and San Martin to be admitted against him in their joint trial and by denying his motion to sever his trial from that of his codefendants. In Franqui v. State, 22 Fla. L. Weekly S373 (Fla. June 26, 1997), we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is no question that both Franqui's confession and San Martin's confession interlocked with Gonzalez's confession in many respects and was substantially incriminating to Gonzalez. Moreover, we cannot say that the totality of the circumstances under which Franqui and San Martin made their confessions demonstrated the particularized guarantee of trustworthiness sufficient to overcome the

presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.

Thus, the admission of the confessions of Franqui and San Martin was error. However, with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Gonzalez confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, it was determined that the fatal bullet came from the gun that Gonzalez was carrying. Gonzalez admitted being with Franqui, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Further, Franqui's fingerprints were found on one of the stolen vehicles. Moreover, Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. Thus, we conclude that there is no reasonable possibility that the erroneous admission of the confessions of Franqui and San Martin contributed to Gonzalez's conviction for felony murder.

PENALTY

We agree, however, that Gonzalez's sentence must be reversed. In Franqui's confession, he said that upon approaching the bank, Gonzalez pulled out a gun and told the security guard not to move. Thereafter, he heard a shot, so he also shot his gun. He said he did not know if the shot he heard was fired by Gonzalez or the security guard, but the evidence later developed that the security guard never fired his gun. On the other hand, Gonzalez said it was Franqui who told the security guard not to move and that Franqui shot the security guard before Gonzalez shot him. He said Franqui fired three or four shots and that he only shot once. Consequently, in determining whether or not Gonzalez should be sentenced to death, we cannot say that the erroneous admission of Franqui's confession which portrayed Gonzalez as the aggressor who had precipitated the shooting was harmless beyond a reasonable doubt. Accordingly, we affirm Gonzalez's convictions but vacate the sentence of death and remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

OVERTON, GRIMES and WELLS, JJ., concur.
SHAW, J., concurs in result only as to conviction and concurs as to sentence.

HARDING, J., dissents with an opinion, in which KOGAN, C.J., and ANSTEAD, J., concur.
ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J., concurs.

HARDING, J., dissenting.

For the reasons expressed in my dissenting opinion in Franqui v. State, 22 Fla. L. Weekly S391 (Fla. July 3, 1997), I dissent from the majority's resolution of the jury selection issue regarding juror Diaz in this case. Id., at S394-95 (Harding, J., dissenting). Because I conclude that Gonzalez's peremptory challenge was improperly denied, I would reverse his convictions and remand for a new trial.

KOGAN, C.J. and ANSTEAD, J., concur.

ANSTEAD, J., dissenting.

I dissent for the same reasons that are discussed in detail in the separate opinions in Franqui v. State, 22 Fla. L. Weekly S391 (Fla. July 3, 1997). I agree with Justice Harding's opinion on the juror selection issue. Further, it is apparent that trying these several defendants together and erroneously utilizing the hearsay out-of-court statements of each of them against one another severely prejudiced the defendants in both the guilt and penalty phases of the trial. It would have been virtually impossible for the jury not to have considered the erroneously admitted co-defendants' statements as major building blocks in the case against appellant. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

KOGAN, C.J., concurs.

Supreme Court of Florida

THURSDAY, OCTOBER 30, 1997

RICARDO GONZALEZ,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 84,841
	*	
STATE OF FLORIDA,	*	Circuit Court No.91-2141(D)
	*	(Dade)
Appellee.	*	
	*	

* * * * * * * * * * * * * * * * *

Appellee's Motion for Rehearing is hereby denied.

KOGAN, C.J., OVERTON, SHAW, GRIMES, WELLS and ANSTEAD, JJ., concur

HARDING, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Harvey Ruvin, Clerk
Hon. Rodolfo Sorondo, Jr., Judge

Mr. William M. Norris
Mr. Randall Sutton